

UNITED STATES CIVIL SERVICE COMMISSION

BULLETIN

Washington, D.C. 20415

PIM:SB:gdm

June 25, 1965

BULLETIN NO. 300-2

SUBJECT: Comptroller General Decision on Personal Service Contracts

Heads of Departments and Independent Establishments:

Attached for your information is a decision of the Comptroller General (B-156219, June 1, 1965, published) that clarifies some of the factors affecting agencies' authority to contract for personal services. The principles expressed in this decision are of general application.

Nicholas J. Oganovic

Nicholas J. Oganovic
Executive Director

Attachment (may be retained indefinitely)

INQUIRIES: Program Systems and Instructions Division
Code 183, Extension 7483

CODE: 300, Employment (General)

DISTRIBUTION: FPM



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

pjs

B-156219

June 1, 1965

PUBLISHED

Dear Mr. Knott:

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Comp. Gen.-----

We refer to your letter of February 26, 1965, concerning the authority of the General Services Administration to enter into certain contracts for the procurement of the services of clerks, typists, telephone operators and teletype operators on a temporary basis during peakload and emergency periods.

The Civil Service Commission has questioned your Agency's authority to enter into those contracts on the basis that they involved the obtaining of personnel in a manner not authorized by the civil service laws and the Classification Act of 1949. You ask our decision on three questions concerning the contracts. Your first question is:

"May not the contracts which GSA has used in obtaining such temporary, emergency services be properly classified as contracts for nonpersonal services and not contracts for purely personal services connoting an employer-employee relationship?"

The existence of an employer-employee relationship depends not upon the nature of the work to be done but upon the method chosen to accomplish that work. In the case of prototype contracts which you have furnished the contractor will supply personnel to assist the Government in the performance of Government functions when made necessary by reason of a temporary requirement for doing work during peakload periods or by reason of emergency conditions. The contracts provide that the individuals supplied by the contractor will be able to perform the type of work which is the subject of the contracts--typing and clerical services or telephone and teletype operator services--in accordance with the minimum standards set forth in the contracts and that if an individual supplied does not perform satisfactorily the contractor will furnish another individual. Our opinion is that the contracts clearly contemplate that the individuals supplied will work under the supervision of Government employees and the clerical and typing contract specifically calls for Government supervision.

The generally accepted test of Federal employment includes three requirements; first, performance of a Federal function; second, appointment or employment by a Federal officer; and third, supervision and direction by a Federal officer. The individuals working under contracts

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such as those in question perform a Federal function. Although individual workers employed under those contracts are not appointed in the usual manner by a Federal officer, control over their employment is exercised by the Government since the Government has the right to require immediate replacement of any individual determined to be unsatisfactory.

Regarding the supervision test for Federal employment the contracts do not specify except in a very general manner the work which is to be done by the contractor-furnished personnel. The clerical and typing contract specifically provides for Government supervision and we do not have evidence indicating that the work to be done under either contract can be properly performed or is performed without detailed instructions and close supervision by Government personnel. We must emphasize here that supervision over the individuals performing the work required under a contract remains in the hands of Government personnel even if the contractor provides an additional employee to act as supervisor and relay instructions of Government personnel to other contractor-furnished personnel, and that the test of supervision by Government personnel must be applied to a contract as it operates even though its terms do not call for supervision.

It would seem evident from the prototype contracts furnished that they are contracts under which the contractors' prime contribution is to furnish people who are managed and supervised by Government officials. We must hold on the basis of the evidence presented that the contracts in question properly are to be classified as personal service contracts and the relationship between the Government and the individuals concerned is tantamount to an employer-employee relationship. We do not find any indication that the telephone operator services would be under the nonpersonal service contract conditions indicated in 6 Comp. Gen. 828. Your first question is answered accordingly.

Your second question is:

"Do not the provisions of the Independent Offices Appropriation Act, 1965 (Public Law 88-507), providing for operating expenses, Federal Supply Service, constitute an exemption to the Civil Service Act and the Classification Act of 1949, as amended, by specifically authorizing contractual services incident to receiving, handling, and shipping warehouse items?"

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That provision provides as follows:

"For expenses, not otherwise provided, necessary for supply distribution, procurement, inspection, operation of the stores depot system (including contractual services incident to receiving, handling, and shipping warehouse items), and other supply management and related activities, as authorized by law, \$50,670,000."

It does not specifically authorize an exception to the civil service laws and the Classification Act and such an exception need not be implied in order to give meaning to the authorization for performance of services by contract. We note also that neither its language nor its legislative history makes mention of personal service contracts. Cf. 38 U.S.C. 213. It has been held that services normally performed by Government personnel may be performed under contract only if it can be shown that contracting out is substantially more economical or feasible or is necessary in the circumstances. That rule is to be applied to contract procurement on a strictly job basis under which the Government contracts for the furnishing of a product or the performance of a service with no detailed control or supervision over the method by which the result required is accomplished. See 24 Comp. Gen. 414; 28 *id.* 296; 43 *id.* 390. While the General Services Administration was given specific contracting authority for the receiving, handling and shipping of warehouse items by the above-quoted appropriation language, our view is that the provision does not authorize the Administration to enter into a "personal service" contract for "employee" support services without regard to the Classification Act and the civil service laws. Your second question is answered in the negative.

Your third question is:

"Does not GSA have inherent authority to obtain temporary employees by contract under emergency or unusual conditions without the need of special legislation exempting such employment from the Civil Service Act and the Classification Act?"

Your agency does not have inherent power to disregard the enactments of Congress with regard to the Classification Act and the civil service laws and "employ" individuals through personal service contracts with private organizations on the basis of the fact that the furnishing of people is required only temporarily or intermittently.

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It is our understanding that representatives of your agency will consult with the Civil Service Commission without delay concerning the employment of personnel under the civil service laws with a view to replacing the contractor employees in question with Government employees.

If you find, however, that contracting for personnel on a personal service basis is the only satisfactory means of obtaining the required services you should obtain specific legislative authority to employ personnel without regard to the civil service laws and the Classification Act before you enter into further personal service contracts of the type in question. We will not object if the contracts currently in force are used to procure personnel until arrangements have been made for performance of the work by other means.

Sincerely yours,

Joseph Campbell

Comptroller General
of the United States

The Honorable Lawson B. Knott, Jr.
Acting Administrator
General Services Administration